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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. A-475

BOWMAN TRANSPORTATION, INC.; JOHNSON MOTOR LINES, INC.; RED BALL MOTOR FREIGHT, INC.; LORCH WESTWAY CORPORATION, et al.; UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., et al.,
Appellees.

On Appeal from the United States District Court for the Western District of Arkansas, Fort Smith Division

## JURISDICTIONAL STATEMENT

**Of Bowman Transportation, Inc.**

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January 3, 1974

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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## JURISDICTIONAL STATEMENT

**Of Bowman Transportation, Inc.**

### OPINIONS BELOW

The Opinion of the Three-Judge District Court was filed September 11, 1973 (App.J, 739),[1] and is reported in 364 F.

[1] Since three motor carrier defendants, a group of 41 intervenor shippers, the Interstate Commerce Commission and United States have filed separate appeals from the judgments of the Three-Judge District Court, a separate Appendix has been printed containing all pertinent orders to avoid duplication. The appendix references in this Jurisdictional Statement will refer to the appendix numbers in the printed appendix, the first page of which is 93. Page numbers following the alphabetical appendix refer to the first page number of that appendix.

Supp. 1239. The Report of the Interstate Commerce Commission (ICC), served January 24, 1972, is printed at 114 M.C.C. 571-796 (App.B, 363). The Opinion of the Three-Judge District Court denying the Motion of the United States and ICC to amend the judgment to provide for remand to the Commission for further proceedings instead of permanently enjoining administrative consideration was entered on October 4, 1973 (App.N, 307), and is reported in 364 F. Supp. 1266. The importance of a complete record in this appeal arises, in part, from the mechanical adoption verbatim by the District Court of findings of fact and conclusions of law prepared by the plaintiffs below.[2] Timely appeals were taken and separate Jurisdictional Statements are being filed by each appellant.

## JURISDICTION

This action was originally filed by competing motor carrier plaintiffs[3] to set aside an order of the ICC granting motor carrier operating authority to the three motor carrier appellants under 49 U.S.C.A. 307. The order and judgment of the Three-Judge District Court, entered on September 11, 1973,[4] improperly arrogated to itself a decision committed by statute to the ICC, by setting aside the Commission order of approval and enjoining any further proceedings by the Commission. On September 17, 1973, the United States and ICC filed a motion to amend the judgment to provide for remand to the Commission for further proceedings on the ground that the judgment entered was beyond the jurisdiction of the Court. The motion was denied by the District Court on October 4, 1973 (App.N, 807). Bowman Transportation, Inc. (Bowman) filed notice of appeal

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[2] Motor carrier competitors which unsuccessfully protested applications of the carrier appellants before the ICC.

[3] Under 28 U.S.C.A. 1336, 1398, 2284 and 2321-2325.

[4] App. J. 739.

from the original District Court order on October 2, 1973 (App. M, 803) and notice of appeal from the original and subsequent order on October 19, 1973.[5] Timely separate appeals were filed by each of the other appellants.

The jurisdiction of this Court to review the judgments of the District Court on direct appeal is conferred by 28 U.S.C.A. 1253 and 2101(b). **American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.,** 387 U.S. 397, 18 L. Ed. 2d 847, 87 S.Ct. 1608, reh. den. 389 U.S. 889, 19 L.Ed.2d 197, 88 S. Ct. 11, 12; **American Trucking Associations, Inc. v. United States,** 364 U.S. 1, 4 L.Ed.2d 1527, 80 S.Ct. 1570; **United States v. Dixie Highway Express, Inc.,** 389 U.S. 409, 19 L.Ed.2d 639, 88 S. Ct. 539.

## THE STATUTES INVOLVED

The statutes involved[6] are set out in the joint Appendix (A. 93). The principal statute involved is § 207(a) of the Motor Carrier Act, 49 U.S.C.A. 307(a).

## THE QUESTIONS PRESENTED

The basic questions here involved are as follows:

1. Did the Three-Judge Court err by mechanically adopting verbatim an order prepared by the parties seeking judicial review of an administrative agency which reversed

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[5] Under 28 U.S.C.A. 1253 and 2101, Rule 72 of the Federal Rules of Civil Procedure for the United States District Courts and Supreme Court Rule 10.

[6] 49 U.S.C.A., preceding § 1 note, § 301 note, § 901 note and § 1001 note, §§ 17(4) and (5); 307(a) and (b); 5 U.S.C.A. 556, 557 and 706; 28 U.S.C.A. 2284(1) and (5).

the expert agency decision, refused to remand and enjoined any further agency consideration in the case, thereby substituting the judgment of the Court for the agency, which had Congressional responsibility therefor?

2. Can a Three-Judge District Court lawfully set aside and enjoin an order of the Interstate Commerce Commission granting an extension of a motor carrier certificate on the ground the Court does not agree with the order or may consider the evidence would warrant a different conclusion?

3. Is a carrier which withdrew from a motor carrier proceeding and which did not exhaust its administrative remedies entitled to intervene and raise an issue related to tacking of operating authority acquired by applicant during pendency of an extension proceeding, where the only justification for such intervention is the subsequent acquisition of new rights by the petitioning carrier?

4. Whether Commission order issued following extensive hearings, involving a voluminous record, admittedly concluded within all time limitations and commission rules can be judicially determined to be so stale "as a matter of law" to prohibit any required findings or further consideration. If so, when does such an administrative action reach that point?

5. Can such an issue be raised for the first time on review after the action has been administratively concluded and where multiple time extensions were requested and granted to the parties?

## STATEMENT

### I

**The Three-Judge District Court Erred in Reversing the Expert Decision of an Administrative Agency, in Refusing to Remand the Case to That Agency and in Abdicating Its Judicial Function by Mechanically Adopting Verbatim Proposed Findings and Conclusions by One of the Parties Before the Court.**

This proceeding before the ICC was commenced by 20 substantial motor carriers filing applications under 49 U.S.C.A. 307 seeking extensions of their operating rights. Each applicant represented and verified to the Commission that a public need existed for additional motor carrier operations principally between points in the Southeast and the Southwest. To develop an orderly procedure, the Commission consolidated 10 of the applications for hearing. The proceeding admittedly involved "what is perhaps the most extensive record ever developed in connection with a single group of motor carrier application proceedings before the Commission".[7]

Following 147 days of oral testimony from 1,009 witnesses, who presented 1,989 exhibits, many of which were several hundred pages in length, consideration of the Recommended Report of the Examiners, and four separate sets of briefs[8] from the par-

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[7] **Herrin Transportation Company Extension, Atlanta, Georgia,** 114 M.C.C. 571, served January 24, 1972, which, as noted, is the subject Commission Order (App. B, 101).

[8] All the issues raised and involved in the administrative proceedings were briefed and re-briefed by the parties in (1) original briefs filed by substantially all the parties; (2) exceptions and supplemental exceptions to the Examiners' Report and replies thereto; (3) petitions for reconsideration of the Report and Order of the Commission and replies thereto; (4) petitions under Rule 102 and replies thereto.

ties, the Commission issued one of the most thorough and best documented orders in Commission history, containing 225 pages, including 120 chart pages carefully summarizing the transcript of 23,423 pages. After the Commission order, the plaintiffs selected the court[9] and filed their complaint seeking judicial review. The entire record was certified by the Secretary of the ICC to the Clerk of the District Court in boxes which were stored in the basement of the Federal Building at Fort Smith, Arkansas, in which condition, almost, if not all remained during ostensible judicial review.[10] The District Court arrogated to itself the right to decide dogmatically the issue of public convenience and necessity, i.e., whether additional motor carrier operating rights should be issued, which is the statutory duty and responsibility of the ICC.

At the time of submission, the Three-Judge District Court requested the parties to file a proposed order. All did so. The Court then completely abdicated its judicial responsibility and proceeded to mechanically copy verbatim the plaintiff's proposed findings and conclusions. In the joint Appendix we have numbered the paragraphs of the Court order of September 11, 1973 to correspond with the numbers in the plaintiff's proposed find-

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[9] Under 28 U.S.C.A. 1398, this action could be brought in the judicial district of the residence or principal office of any of the parties bringing the action. Of the 19 plaintiffs, only 2 claimed residence in the district where the suit was filed. Arkansas-Best Freight System, Inc. (ABF) and Mercury Motors, Inc. (Mercury). ABF filed a protest to the Bowman application, but withdrew. Mercury operated over regular routes between Memphis and Fort Smith by way of Little Rock. It protested the Bowman application, but the application was amended to exclude Fort Smith.

[10] See Affidavit of Robert L. Jones, Esq., Fort Smith, Arkansas, attached as Appeidix A. We also invite official inspection of the record transmitted to the Clerk of the Supreme Court by the Clerk of the District Court in substantially the same condition and some in unopened containers used by the Secretary of the ICC in transmitting the record to the Clerk of the District Court.

ings and conclusions.[11] This is not the judicial review contemplated and required, particularly when reviewing "the most extensive record ever developed" in such a proceeding. This raises a novel issue of judicial administration, i.e., the verbatim adoption by a Three-Judge District Court of proposed findings and conclusions by one party, now squarely presented for the first time for decision by the Supreme Court. In the determination of this issue, the Court may well be guided by the following authorities and well established principles:

(a) **In the context of a three-judge district court review of an administrative order, all three judges must fully perform the judicial function.**

In **Ayershire Collieries Corp. v. United States** (1947), 331 U.S. 132, 138, 91 L.Ed. 1391, 73 S.Ct. 1168, the Supreme Court held that a district court's judgment was void where only two of the three judges participated in determination of the case due to illness of the third. Here, the judicial function was exercised only through copying verbatim an order prepared by the plaintiffs.

(b) **"Fairness and minimum requirements of due process require that findings and conclusions be those of the court and not of counsel and that 'it must be the independent and solitary decision of the judge.'"**

This is the language of the then Circuit Judge (now Justice) Blackmun in **Bradley v. Maryland Casualty Co.** (8th C.A. 1967), 382 F. 2d 415, 422, where, in conclusion, the Court fixed the guideline (here violated) as follows:

"We venture to suggest that if, because of prevailing custom, or pressure of work, or a case's technical nature, or

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[11] The Court admitted the plaintiff's proposed order was "adopted by the Court as hereinafter set forth".

> for other reasons, counsel must be asked to assist in the preparation of findings and conclusions, it is better practice to make this request at or soon after the submission of the case and prior to decision and to make it of both sides. 5 Moore's Federal Practice (2d Ed. 1966), Par. 52.06(3), p. 2665. Then the court may pick and choose and temper and select those portions which better fit its own concept of the case."

Here, there admittedly was no "picking, choosing, tempering or selection." Instead, the arbitrary mechanical acceptance of the order prepared by plaintiff advocates led the Court to the errors herein specifically noted.

(c) **For purposes of review "maximum doubt" is cast upon findings of fact and conclusions of law mechanically and erroneously adopted by the court below.**

In **Roberts v. Ross** (3rd C.A. 1965), 344 F.2d 747, the Court held and declared:

> "But counsel who is called upon to articulate and write out the findings and conclusions must do so without any knowledge of the fact findings and reasoning processes through which the judge has actually gone in reaching his decision.
>
> We strongly disapprove this practice. For it not only imposes a well-nigh impossible task upon counsel but also flies in the face of the spirit and purpose, if not the letter, of rule 52(a).
>
> Findings and conclusions prepared ex post facto by counsel, even though signed by the judge, do not serve adequately the function contemplated by the rule."

See also **In Re Las Colinas, Inc.** (1st C.A. 1970), 426 F. 2d 1005; **Louis Dreyfus & Cie v. Panama Canal Co.** (5th C.A. 1962), 298 F. 2d 733.

(d) **The functions of an ardent advocate and an impartial judge are essentially inconsistent. Findings "mechanically adopted" are not "the product of a disinterested judicial mind" essential to an evaluation of the court's reasoning.**

In **United States v. El Paso Natural Gas Co.**, 376 U.S. 651, 656, 12 L.Ed.2d 12, 84 S. Ct. 1004, the Supreme Court emphasized that findings and conclusions "drawn with the insight of a disinterested mind are more helpful" than those "mechanically adopted" which do not reveal the discerning line for decision of the basic issues in the case.[12]

Findings and conclusions prepared by counsel, even though signed by the Court, do not adequately serve the function contemplated and required by Federal Rule 52(a), particularly where the order prepared and proposed by one of the parties is simply copied verbatim. The purpose of Rule 52 is to require the Court to formulate and articulate its findings of fact and conclusions of law in the course of its determination of the case

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[12] In **United States v. El Paso Natural Gas Co.** at 376 U.S. 656, fn. 4, the Supreme Court quoted Judge J. Skelly Wright of the Court of Appeals of the District of Columbia as follows: "Who shall prepare the findings? Rule 52 says the court shall prepare the findings. 'The court shall find the facts specially and state separately its conclusions of law'. We all know what has happened. Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a noncompliance with Rule 52 specifically and it betrays the primary purpose of Rule 52—the primary purpose being that the preparation of these findings by the judge shall assist in the adjudication of the lawsuit." **Seminars for Newly Appointed United States District Judges** (1963), p. 166. See also **United States v. Howard** (3rd C.A. 1966), 306 F.2d 373; **Industrial Building Materials, Inc. v. Interchemical Corp.** (9th Cir. 1970), 437 F.2d 1336; **Louis Dreyfus & Cie v. Panama Canal Co.** (5th C.A. 1962), 298 F.2d 733; **Chicopee Mfg. Corp. v. Kendall Co.** (4th C.A. 1961), 228 F.2d 719; **United States v. Forness** (2d C.A. 1942), 125 F.2d 928.

and its decision making process. Here, the Court did not review the record. Frankly, in view of its magnitude, it would be asking too much of any court. This is one of the reasons supporting the rule of limited judicial review and the requirement to remand the proceedings if, and when, error is found, both of which requirements were here violated. But where issues were in sharp conflict, it is not asking too much to request the Court to review and consider the record or the Commission orders as to those aspects before arbitrarily and blindly adopting the factual argument of one of the parties. The subject order demonstrates a completely unbalanced consideration of the evidence which is the understandable result of mechanically adopting findings and conclusions which are the product of zealous counsel whose duty, as advocates, was to present all their contentions in the light most favorable to their clients.

## II

**The Three-Judge Court Exceeded Its Limited Review Functions Contrary to Well Established Supreme Court Precedent by Adopting the Plaintiffs' Proposed Order Which**

### (a) Weighed the evidence before the Commission

In the Court below, the plaintiffs argued that the Commission erred in according more weight to the transit time studies of more than 200 shipper witnesses than it did to the transit time studies of 14 interested motor carrier protestants (37).[13] The Court's (plaintiffs') order quoted at length from the Examiners' Report with respect to transit time and omitted entirely the findings of the Commission on this issue. Adopting the plaintiffs' order, the Court below held that (30):

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[13] Figures in parentheses refer to paragraph numbers of the plaintiffs' proposed order and the order of the Three-Judge Court entered September 11, 1973 (App. I, 697 and J, 739).

> "These summaries of the shippers' evidence demonstrated that service rendered by the applicants was not superior, but in fact was inferior, to that rendered by protestants and that protestants' service was, on the whole, reasonably expeditious."[14]

That representative statement is factually incorrect, legally impermissible and directly contrary to the factual finding of the Commission. It is simply the plaintiffs' argument "mechanically adopted". What the Commission actually found and stated with respect to the transit time studies is set out in Appendix B attached (114 M.C.C. 596, 599, 600). The Court (plaintiffs') order does not discuss these specific findings of the Commission which were ineluctably supported by the record evidence. Additionally, the Court (plaintiffs') order omits entirely any consideration of the specific Commission finding that (114 M.C.C. 596):

> "The supporting shippers generally express dissatisfaction with the existing transportation services, with the major complaint directed against excessive and erratic transit times between pickup and delivery of their traffic. Approximately 650 shippers have complained about inconsistent and excessive transit times, and over 200 introduced transit time studies demonstrating the undependable service they currently receive."

and that (114 M.C.C. 597):

> "Approximately 110 shippers complain about interline difficulties and about 200 shippers collectively complain about loss, damage, tracing difficulties, and misrouting, much of which occurred in interchange service. There is

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[14] This is in direct conflict with the admission in the Court's (plaintiffs') order (19) that "most shippers generally expressed dissatisfaction with inconsistent and excessive transit times". The Court (plaintiffs) do not attempt any explanation of this dichotomy.

> a clear and direct correlation between the number of times a shipment is interchanged, and the expeditiousness of the service, the possibility of loss or damage, and the difficulty of tracing. Thus, as a general rule, the fewer times a shipment is interchanged, the greater the chance that the shipment will be handled expeditiously, the lesser the chance of loss or damage, and there should be less difficulty with tracing."

Further (114 M.C.C. 597):

> "Approximately 170 shippers located at points in 20 of the involved States indicate that they have received complaints from their customers with respect to the existing service."

and that (114 M.C.C. 597):

> "Pickup and delivery complaints were voiced by about 150 shippers located throughout 18 States."

The weight accorded to the various transit time studies and the reasons therefor were clearly stated by the Commission. All the documents are summarized in the Commission order, particularly Appendix E thereto.

650, or approximately 80% of the 824[15] shipper witnesses who testified in this proceeding had specific complaints of inadequate and inconsistent transit time and expressed a dire need for reliable and consistent service between the Bowman authorized and proposed points.

The supporting shippers and receivers testified that as a result of inconsistent and excessive transit times experienced on a recurring basis, their business has been materially hampered by an inability to

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[15] This represents the 933 witnesses who testified less the 109 which supported the application of Roadway, which was denied.

—reduce inventories where their storage space and investment capial were limited.

—maintain production schedules where they are dependent upon consistent service.

—give timely delivery or serve customers on special orders, for example, on special and promotional merchandise not in stock or merchandise involving government contract work containing penalty clauses for delays if timely deliveries are not effected.

—take short term discounts.

—obtain job site delivery to metropolitan areas where construction crews and production lines frequently are awaiting arrival of goods and supplies.

—carry in stock the multiple sizes, colors and grades of such items as carpets, textiles, tile and paint, thereby making it necessary to order from brochures or samples and to depend upon expeditious, consistent motor carrier service.

—order from preferred markets.

Additionally:

—the fact that quicker and more dependable service is available between the west coast and Texas points, militates against the southern market.

—installations cannot be made in the time and manner required.

—companies have been unable to advise customers as to delivery of special orders of merchandise not in stock.

—many companies have been required to pay higher or premium prices in order to insure a reasonable delivery time from now preferred markets.

The District Court judicially held that in the study and application of such transit time exhibits, the Commission, as a matter of law, must give greater weight to the records of protestant motor carriers, a position which the Commission previously had rejected in **Strickland Transportation Company,** 77 M.C.C. 655, 663, stating:

> "We cannot accept the general proposition that a carrier's records are accurate and that a shipper's records are not, or that the carrier's records are more likely to be accurate than the shipper's."

It is well settled that reviewing courts should not weigh the evidence. As was recognized in **Arrowhead Freight Lines v. United States,** 115 F.Supp. 537, 544 (S.D. Cal. 1953):

> "**To consider the weight of the evidence before the Commission,** the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made in other cases, **is beyond our province.** Virginia R. Co. v. United States, 1926, 272 U.S. 658, 663, 47 S.Ct. 222, 224, 71 L.Ed. 463; see also Universal Camera Corp. v. N.L.R.B., 1951, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456; United States v. Pierce Auto Freight Lines, 1946, 327 U.S. 515, 535-536, 66 S.Ct. 687, 90 L.Ed. 821; Rochester Tel. Corp. v. United States, 1939, 307 U.S. 125, 139-140, 59 S.Ct. 754, 83 L.Ed. 1147; I.C.C. v. Union Pac. R.R. Co., 1912, 222 U.S. 541-547-548, 32 S.Ct. 108, 56 L.Ed. 308." (Emphasis supplied.)

The Court's (plaintiffs') suggestion that Bowman transit time studies were considered to support the feasibility of its proposal and rejected to support the challenge is incorrect. The Commission carefully summarized the exact results of the studies (114 M.C.C. 586) and considered them with other factors, including highway conditions, and applied to all this evidence

the weight it concluded appropriate. The weight to be accorded the evidence is for the Commission and not for the courts, absent arbitrary action. **Patterson v. United States and Interstate Commerce Commission,** 178 F.Supp. 771 (1959); **Riss & Co. v. United States,** 100 F.Supp. 468, 484; **Carolina Freight Carriers v. United States,** 297 F.Supp. 848; **Universal Camera Corp. v. N.L.R.B.,** 340 U.S. 474, 488, 95 L.Ed. 456, 71 S.Ct. 222; **Mississippi Valley Barge Line Co. v. United States,** 292 U.S. 282, 286, 78 L.Ed. 1260, 54 S.Ct. 692.

The Court's (plaintiffs') order goes to the extreme of holding that the plaintiffs who selected the time periods and prepared and presented their transit time studies were deprived of "an opportunity to defend their propriety or correct the alleged deficiencies" (41). Any review of the record would have exposed that error. The hearings continued for 147 days. None of the plaintiffs sought "to correct" the deficiencies and instead of remanding the case, the Court enjoined the Commission from further proceedings, thus giving full effect to the plaintiffs' argument and substituting its judgment for that of the Commission upon whom the statutory responsibility is supposed to rest.

The Court (plaintiffs) contends that if "standards" relating to a consideration of transit time studies are to be changed "the parties were entitled to reasonable notice and an opportunity to confirm to such changes" (40). What opportunity is afforded under the subject Court order which arbitrarily terminated the most extensive motor carrier record ever developed? How can the action of the Three-Judge Court, below, in weighing the evidence, ignoring the Commission's findings, adopting verbatim the arguments of plaintiffs and giving complete effect to the rejected findings of the Examiners be reconciled with the rule established for review of Commission orders succinctly stated by Justice Brandeis in **Virginia R. Co. v. United States,** 272 U.S. 658, 71 L.Ed. 463, 468, 47 S.Ct. 222, that:

> "This court has no concern with the correctness of the Commission's reasoning, with the soundness of its decision, or with the alleged inconsistency with findings made in other proceedings before it."

Accord: See **Interstate Commerce Commission v. Union P. Ry. Co.**, 222 U.S. 541, 56 L.Ed. 308, 32 S.Ct. 108.

(b) **Adopted the errors of the Examiners (1) in considering all the applications collectively and (2) in relation to the commodities shipped to the exclusion of the territories involved.**

Of the 31 pages and 56 paragraphs contained in the Court's (plaintiffs') findings of fact, 18 pages and 33 paragraphs deal exclusively with a preliminary statement and the rejected Examiners' Report. The Examiners considered all applications collectively and classified the freight into 45 categories. The District Court erroneously stated that this "method used by the Examiner was consistent with the method used by the applicants and protestants in their respective abstracts of the evidence presented to the Examiners" (20). That statement is incorrect and had the Court reviewed the record and exceptions, it would have found, as did the Commission (114 M.C.C. 574) that:

> "Collectively, applicants except to the basic approach taken by the examiners in assertedly considering those applications on the erroneous concept that either all must be granted or all must be denied. It is averred that the examiners should have evaluated, and made findings and conclusions relating to, each application as a separate and independent matter, and that the supporting testimony should not be treated only in relation to the commodities shipped to the substantial exclusion of the territories and points involved."

Bowman and other applicants strongly excepted to the Examiners' approach, pointing out there was no question that gen-

eral commodity traffic was involved and that specific findings were required as to each applicant. The Court (plaintiffs) adopted the error of the Examiners, considered the case on a *de novo* basis and, contrary to prior judicial admonition, substituted its judgment for that of the Commission. This was error. **Patterson v. United States and Interstate Commerce Commission**, 178 F.Supp. 771 (1959); **Willis Shaw Frozen Express, Inc. v. United States,** 256 F.Supp. 257 (1966).

(c) **The Court (plaintiffs) adopted the plaintiffs' claim that approval would expose plaintiffs' traffic to potential diversion and ignored the Commission's conclusion that "the gains to be derived by the shipping public in general far outweigh any adverse effect . . . any . . . protestant may experience." (144 M.C.C. 611.)**

The Court (plaintiffs) discussed in detail the evidence presented by protestant motor carriers (plaintiffs) of a potential diversion of traffic and adopted in full the plaintiffs' claims, but failed to refer to the Commission consideration of this testimony together with that of the 824 shipper witnesses who related specific complaints of inadequate and inconsistent service and expressed a dire need for the service proposed. That testimony is completely ignored in the Court's (plaintiffs') order. Throughout the Court (plaintiffs) discuss what the Examiners found without reference to the Commission discussion of those facts and the ultimate conclusions found by the Commission. We simply ask this Court to read the District Court Order and the Order of the Commission (114 M.C.C. 571) and then make a determination whether a fair consideration was accorded and whether justice prevailed in this proceeding below.

The Court (plaintiffs) argued that (45):

"The decision omitted entirely the examiners summary of all evidence presented by six carriers that had protested

> only the application of one of the carriers that had failed to file exceptions."

The facts are, the Commission specifically stated (114 M.C.C. 598):

> "The evidence of the opposing carriers, as summarized by the examiners, is set forth in appendix G to this report. Those protestants opposing only the application of Roadway are not included in that summary."

The Examiners recommended the application of Roadway Express, Inc. be denied. It filed no exceptions and the recommended denial became final under Commission Rule 97. The 6 carriers omitted protested only the Roadway application. Rule 247(d)(2) of the Commission rules provides that failure to timely protest is a waiver of opposition and participation in the proceedings.

The Court (plaintiffs) erroneously stated that the Commission refused to "evaluate the effect of this expanded service" arising from extensions or expansions of operating authority "subsequent to the close of the hearing" (46). This is incorrect. To the contrary, the Commission specifically stated (114 M.C.C. 576):

> "As indicated in appendix D, certain protestants request that official notice be taken of specified motor carrier changes, in the involved area, that have been approved and authorized by this Commission since the close of these hearings in August 1967. We may take official notice of our action in other proceedings which bear materially upon the issues under immediate consideration. West Brothers, Inc., Extension—Baton Rouge, La., 108 M.C.C. 485, 489 (1969); and Ayers Extension—Cheyenne, Wyo., 99 M.C.C. 795, 797 (1965). Accordingly, the actions affecting protestants have been noted in appendix G and those actions affecting carriers not parties to this proceed-

ing, although not specified in detail in this report, have nevertheless been accorded full and careful consideration in our present determinations."

Additionally, the Examiners or the Commission, or both, made specific reference to 23 separate orders approving the extension or merger of operating rights, a list of which is attached as Appendix C. These facts would have been apparent to the Court from a study of the Commission order.

The Court (plaintiffs) stated (48) that approval would result in a deterioration of service, primarily to small communities proposed to be traversed. If the Court had simply examined the Commission order (114 M.C.C. 777), it would have found that the claim was made by Campbell-66, one of the plaintiff protestants, and it would further have noted what the Commission found and what the District Court omitted, that (114 M.C.C. 777:

"Diversion of freight from its terminal points will result in a deterioration of service at many of the smaller points served by Campbell Sixty-Six, particularly in Misissippi, which are not proposed to be served directly by these applicants. **However, in this connection it is to be observed that Campbell Sixty-Six has asked connecting carriers not to tender it freight for certain Mississippi points it is authorized to serve."** (Emphasis supplied.)

Nowhere is it suggested that the Commission order was not supported by substantial evidence. In fact, 933 public witnesses admittedly testified to a public need for the proposed service which they declared was essential to the proper operations of their businesses. The order of the District Court is in irreconcilable conflict with its conclusion that:

"Generally an order of such an agency will be sustained if it is within the agency's statutory powers and is based

on appropriate findings which in turn are supported by substantial evidence."

After 147 days dedicated to oral hearings and to compiling a record never equalled in Commission motor carrier history, we are confronted with an arbitarary judicial review of the record and the Commission order based thereon without the respect of an examination of that record by the Court.

III

**The Court (Plaintiffs) Concluded That the Petition for Intervention and Reconsideration Filed by ABF as to the Bowman Application Should Have Been Granted for Consideration of the Issue Relating to Tacking Bowman Subsequently Acquired Authority With That Here Involved, But Instead of Remanding for a Determination of That Issue the District Court Enjoined Further Proceedings or Consideration.**

During Commission pendency of the subject action, Bowman purchased from Alabama Highway Express, Inc. (AHE) rights authorizing operations between Birmingham and points within a 65 mile radius thereof, on the one hand, and, on the other, Louisville, Kentucky, points in Tennessee, Indiana and described parts of Florida, Ohio and Illinois. Commission approval of the purchase application in Docket MC-F-9921 enabled Bowman to tack the acquired rights to provide through service. Prior to consummation of the purchase, Bowman had interlined traffic with AHE at common points.[16] None of the plaintiffs protested this acquisition.

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[16] "Tacking" is the joining of separate grants of authority belonging to the same carrier by routing shipments through a point common to the separate authorities so as to provide a through carrier service between the territory served under the authority and that served under another and separate authority. **Chemical Leaman**

Throughout the subject proceeding, Bowman indicated its intention to render service between Montgomery and points on its proposed routes.[17] This case was tried throughout on that basis.

Following publication of notice in the Federal Register (FR), ABF filed a petition to intervene and for rehearing. It is the only plaintiff that did so. The complaint of ABF involved the acquisition by Bowman of a part of the operating authority of AHE during pendency of the subject application and the acquisition by ABF of a part of the operating authority of Youngblood Truck Lines in Commission Docket MC-F-11179 which was not approved until October 15, 1971. Montgomery was not related to the AHE purchase and ABF cannot serve direct any point in Alabama. ABF argued that the authority which Bowman acquired from AHE should be restricted in this proceeding. The Commission denied the petition of ABF to intervene in the proceeding in which it was formerly a party and withdrew. The order of the Commission was right and the order of the District Court is wrong because:

(1) ABF withdrew its protest to the subject Bowman application.

(2) ABF did not protest the Bowman acquisition of AHE.

(3) To insert a restriction affecting the rights Bowman acquired from AHE would constitute an unlawful revoca-

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**Tank Lines, Inc. v. United States,** 208 F.Supp. 1269 (D.Del. 1969); **Braswell Motor Freight, Inc. v. United States,** 336 F.Supp. 709, 711 n. 1 (C.D.Cal. 1971).

"Interlining" is a practice whereby two carriers provide a through service over their respective authorized routes by transferring shipments from one carrier to another at a common service point. **Strickland Transportation Co., Inc.—Purchase—England Transportation Co.,** 104 M.C.C. 297, 316 (1967).

[17] Montgomery was not involved in the AHE purchase.

tion of rights which could be considered only under Section 212 of the Act.

(4) ABF is not authorized to serve any cities in Alabama.

(5) ABF failed to exhaust its administrative remedies. If it had any argument with the Division order of September 1, 1972 denying its petition to intervene, it should have filed a petition for rehearing to that aspect of the order under Commission Rule 101. See **Chicago, St. P. M. & O. R. Co. v. United States,** 322 U.S. 1, 88 L.Ed. 1093, 64 S. Ct. 842.

In any event, if there was any question about the right of ABF to intervene in this proceeding, from which it had withdrawn, where it did not exhaust its administrative remedies, and if it had any standing to raise the issue of restricting the rights acquired by Bowman from AHE against tacking with the rights here involved, the proper procedure would be a remand to the Commission by the Court to consider this late raised issued and not an order enjoining the Commission from any further proceedings with respect to the entire grant.

## IV

**When a Substantial Administrative Proceeding Is Concluded Within the Rules and Time Limitations of the Agency, Further Agency Action Cannot Be Judicially Enjoined on the Basis the Record Is So Stale "as a Matter of Law" That It Will Not Support an Agency Order.**

After the surprising order of September 19, 1973 annulling the Commission order and enjoining further proceedings in this cause, the United States and the ICC filed a motion requesting the Court to amend its judgment to remand the case to the Commission. The motion was denied. The District

Court held that "as a matter of law" the record "dealing with 5 and 6 year old facts—could not lawfully support a finding of public need or additional motor carrier service in 1973 or 1974" (App. N, 807). This raises critical issues of original importance affecting **all** administrative proceedings

—Whether a Commission order issued following extensive hearings, involving a voluminous record, admittedly concluded within all time limitations and Commission rules can be judicially determined to be so stale "as a matter of law" to prohibit any required findings or further consideration.

—If so, when does such an administrative action reach that point?

—Can such an issue be raised for the first time on review after the action has been administratively concluded and where multiple time extensions were requested and granted to the plaintiffs? **Gearhart & Otis v. S.E.C.** (D.C. C.A. 1965), 348 F.2d 798, holds you cannot. See also **United States v. L. A. Tucker Truck Lines, Inc.,** 344 U.S. 33, 37, 97 L.Ed. 54, 73 S.Ct. 67.

Hearings in this proceeding commenced on March 21, 1966 and continued, with little respite, through August 24, 1967. The 225 page Commission order was served on January 24, 1972. No steps were taken and no suggestions were made by any party during the administrative proceedings seeking acceleration of agency action. During the interim, a substantial number of plaintiffs were busily engaged prosecuting applications and obtaining operating rights under representations (contrary to those here made) that additional motor carrier service was needed.[18]

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[18] See Appendix C this statement.

In **Associated Press v. F.C.C.** (D.C. C.A. 1971), 448 F.2d 1095, 1106, the Court stated:

> "We cannot see that the Commission abused its discretion by adopting the procedures and the timing which in its sound judgment it considered necessary to assure an adequate record in a case involving many complex and difficult problems. In any event, if the petitioner were aggrieved by delay in the Commission's proceedings their remedy was an application to a court for an order requiring expedition; it was not rejection of the proposed rates. See Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961); N.L.R.B. v. J. H. Rutter-Rex Mfg. Co, 305 F.2d 242 (5th Cir. 1962); M. G. Davis & Co. v. Cohen, 256 F.Supp. 128, 133, n. 7 (S.D. N.Y.), aff'd 369 F.2d 360 (2d Cir. 1966)."

In **Texaco, Inc. v. F.T.C.** (D.C. Cir. 1964), 336 F.2d 754, rev'd 381 U.S. 739, 14 L.Ed.2d 714, 85 S.Ct. 1798, the District Circuit Court of Appeals set aside an F.T.C. cease and desist order on the grounds that the order was not supported by substantial evidence and that one member of the F.T.C. was disqualified from participating in the case. The Court concluded that the normal procedure of remand was inappropriate because of inordinate delays throughout the litigation, including 4 years of investigation and 8 years of litigation, and ordered the complaint dismissed. This order was vacated by the Supreme Court and the case was remanded to the F.T.C. for further action.

In **F.T.C. v. J. Weingarten, Inc.** (5th Cir. 1964), 336 F.2d 687, 691-2, Weingarten contended that an F.T.C. order remand for additional hearings after nearly 3½ years of formal proceedings violated Section 6(a) of the Administrative Procedure Act (APA). The District Court held that the remand was a violation of the APA and ordered the F.T.C. to make a

final disposition of the matter within 30 days. The Fifth Circuit reversed, stating:

> "(W)e think it would be the extremely rare case where a court would be justified in holding that the passage of time and nothing more presents an occasion for peremptory intervention of an outside court in the conduct of an agency's adjudicative proceedings."

The proper remedy for any delay is a court order to expedite the proceedings not one terminating it altogether. This is particularly true where the record is perhaps the largest in the history of motor carrier regulation, involving 933 witnesses and a tremendous administrative and private investment in time and funds to develop a true record of transportation needs, and no party, at any time, sought to accelerate agency action.

V

**If Legal Error Is Found in the Commission's Order, Judicial Inquiry Is at an End and the Case Should Be Remanded to the Commission.**

The District Court erred in setting aside and enjoining the order of the ICC granting extensions of motor carrier certificates under 49 U.S.C.A. 307(a) on the ground the Court did not agree with the order and considered the evidence would warrant a different conclusion. The District Court exceeded its reviewing authority by rendering the case and enjoining any further Commission consideration or action in the proceeding. It is our position that a district court has authority to set aside an order of the Commission, after proper judicial review, but it cannot substitute its judgment for that of the Commission on the factual issue of public convenience and necessity. **Interstate Commerce Commission v. Union Pac. R. Co.,** 222 U.S. 541, 547, 56 L.Ed. 308, 32 S.Ct. 108; **Mississippi Valley Barge Line**

**Co. v. United States,** 292 U.S. 282, 286, 78 L.Ed. 1260, 54 S.Ct. 692; **Rochester Tel. Co. v. United States,** 307 U.S. 125, 139, 83 L.Ed. 1147, 59 S.Ct. 754; **Universal Camera Corp. v. N.L.R.B.,** 340 U.S. 474, 488, 95 L.Ed. 456, 71 S.Ct. 456; **United States v. Pierce Auto Frt. Lines,** 327 U.S. 515-536, 90 L.Ed. 821, 66 S.Ct. 687, 698.

In **Arrow Transportation Co. v. Cincinnati, N.O. & T.P.R. Co.,** 379 U.S. 642, 13 L.Ed.2d 550, 85 S.Ct. 610, the three-Judge Court (229 F.Supp. 572) set aside and, as here, permanently enjoined the execution and operation of an order of the ICC cancelling certain rate reductions which had been put into effect by the appellee railroad. Contrary to the lower court's statement in this case (App. C, 363), the Court, in **Arrow,** specifically stated the reason for its order was that the new lower rates violated specified sections of the Interstate Commerce Act. The Supreme Court vacated the order of the District Court and directed it to remand the case to the ICC for reconsideration.

In **F.P.C. v. Idaho Power Comm.,** 344 U.S. 17, 97 L.Ed. 15, 73 S.Ct. 85, the District of Columbia Court of Appeals entered an order directing the F.P.C. to modify a license granted by it for a hydroelectric project to allow the government to transmit electricity over the lines of the licensee. The Supreme Court reversed, stating:

> "It is the Commission's judgment on which Congress has placed its reliance for control of licenses. . . . When the court decided that the license should issue without the conditions, it usurped an administrative function. There doubtless may be situations where the provision excised from the administrative order is separable from the remaining parts or so minor as to make remand inappropriate. But, the guiding principle, violated here, is that the function of the reviewing court ends where an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration. (citing cases)."

Accord see: F.T.C. v. Morton Salt Co., 334 U.S. 37, 91 L. Ed. 420, 68 S. Ct. 22.

In **United States v. Saskatchewan Minerals,** 385 U.S. 94, 17 L.Ed.2d 192, 87 S. Ct. 254, the Supreme Court reversed an order of the District Court which remanded the case to the ICC because the District Court order was unduly restrictive and, in fact (as here), precluded the Commission from considering the entire case. The Supreme Court stated that the District Court went too far and that "under the circumstances here, this restriction is an improper limitation on the Commission's duty to reconsider the entire case." There, the Supreme Court held that the remand erroneously attempted to **restrict** the Commission's consideration of the case. Here, the subject order **prohibits** consideration.

The District Court's suggestion that **Interstate Commerce Commission v. Parker,** 326 U.S. 60, 89 L.Ed. 2051, 65 S. Ct. 1490, "has nothing to do with the issue now before this court" is inaccurate. There, as here, the ICC had issued a certificate. There, as here, the District Court enjoined the order. There, the Supreme Court reversed, stating that:

> "The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor carrier service would serve public convenience and needs."[19]

The District Court's excuse for not remanding this case was that (1) "the record in this case is voluminous" and (2) "the record relates to the applications of 10 carriers." Rather than justifying the adamant refusal to remand, these facts should compel such action because it would avoid the necessity of retaking considerable testimony, would permit an updating of the record, if required, and would enable the Commission to consider the proceeding on the basis of an extended background. The Dis-

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[19] It is impossible to reconcile the District Court order with this definitive rule.

trict Court's suggestion that remand would "impede rather than facilitate Commission consideration" reflects a complete incomprehension or indifference to the time and expense of further hearings, involving 933 witnesses, lasting many months, costing many thousands of dollars and repeating the same type testimony already in this record.

In short, the effect of the District Court order will create grave doubt on the consolidation of further applications, thereby resulting in a wasteful expenditure of time and money for all parties. The District Court order will encourage and reward delay. It would enable an organized group of protestants to defeat any application by original briefs to the administrative law judge, exceptions or replies to the recommended order, petitions for reconsideration and petitions under Commission Rule 102.

The District Court order illustrates the hazard of forbidden judicial intrusion into the administrative domain. It should not be allowed to stand. The mandate of the National Transportation Policy (App. A 93) is directed to the Commission and not to the courts. **Schaffer Transportation Co. v. United States,** 355 U.S. 83, 87, 88, 2 L.Ed.2d 117, 78 S. Ct. 173; **Arrow Transportation Co. v. United States,** 176 F.Supp. 411, 416.

## CONCLUSION

Probable jurisdiction should be noted and the judgment below reversed.

Respectfully submitted

MAURICE F. BISHOP
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Of Counsel

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**Certificate of Service**

I hereby certify that pursuant to Rule 33 of the Supreme Court of the United States, I have served a copy of the foregoing Jurisdictional Statement upon all attorneys of record by mailing copies to them, first class mail, postage prepaid, and on all parties more than 500 miles distant (*) by air mail, postage prepaid, to the addresses shown by them in pleadings filed, as follows:

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Dated at St. Louis, Missouri this 4th day of January, 1974.

Sworn to and subscribed before me the day and year aforesaid.

My Commission Expires Dec. 14, 1976

(SEAL)

# ADDENDUM

# APPENDIX A

**Affidavit of Robert L. Jones, Jr.**

State of Arkansas )
County of Sebastian ) ss.

My name is Robert L. Jones, Jr. I am fifty-one (51) years of age. I have actively engaged in the private practice of law in the City of Fort Smith, Arkansas, continuously since September of 1948 (with the exception of 21 months in 1950-52 when I served on active duty in the Judge Advocate General Corps of the United States Army). I am admitted to practice before the Arkansas Supreme Court, the United States District Court for the Western District of Arkansas, the United States Court of Appeals for the Eighth Circuit and the Supreme Court of the United States. I am local counsel in Fort Smith, Arkansas, for Johnson Motor Lines, Inc., Bowman Transportation, Inc., and Lorch-Westway Corporation, et al, intervening shippers in the case in the United States District Court for the Western District of Arkansas, Fort Smith Division, styled "Arkansas-Best Freight System, Inc., et al, v. United States of America and Interstate Commerce Commission, et al, No. FS-72-C-65".

On November 12, 1973, at the request of co-counsel for the named clients, I went to the office of the Clerk of the United States District Court, Western District of Arkansas, Fort Smith Division, for the purpose of conferring with the Clerk concerning matters related to the preparation and transmittal of the record to the Supreme Court of the United States in connection with the appeal from the judgment of this Court entered September 11, 1973, and the order of this Court entered October 4, 1973. The Clerk, Honorable E. A. Riddle, specifically requested instructions with reference to transmittal of the record of the proceedings before the Interstate Commerce Commission, which he stated was stored in boxes in the base-

ment of the Federal Building (the Clerk's office is on the third and top floor of the building). I accompanied Mr. Riddle to the basement to a store room which was locked and we gained entrance by a key in the possession of Mr. Riddle. Mr. Riddle pointed out to me four (4) boxes, size approximately two and a half feet in height by two and a half feet in width and two feet in depth, which had been stamped filed on May 23, 1973 on the outside of the boxes by Mr. Riddle's office. Mr. Riddle informed me that the boxes containing the record of the proceedings before the Interstate Commerce Commission, upon receipt by his office, were stored in this store room and to his knowledge had been in the store room continuously since receipt. A more detailed inspection of the boxes revealed that three out of the four large boxes had been opened and each large box contained two or more smaller boxes. These smaller boxes did not appear to have been opened. I instructed Mr. Riddle to have the four larger boxes with content undisturbed crated into one large container and shipped to the Clerk of the Supreme Court of the United States.

Further affiant sayeth not.

/s/ ROBERT L. JONES, JR.

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Subscribed and sworn to before me, this 16th day of November, 1973.

MARY E. BURROWS
Notary Public

(Seal)

My Commission Expires: April 26, 1977.

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## APPENDIX B

At 114 M.C.C. 596, the Commission stated:

> "The supporting shippers generally express dissatisfaction with the existing transportation services, with the major complaint directed against excessive and erratic transit times between pickup and delivery of their traffic. Approximately 650 shippers have complained about inconsistent and excessive transit times, and over 200 introduced transit time studies demonstrating the undependable service they currently receive. The exhibits show that on a substantial volume of traffic moving between points which applicants propose to serve overnight, shippers have been receiving from 1 to 7-day service, with an average transit time of about 3 days. On traffic which applicants propose to render 2-day service, shippers received between 1- and 14-day service, and the average transit time was about 4 days. A substantial volume of traffic which would receive 3-day service under the various proposals is demonstrated to be subject to service ranging from 2 to 12 days, and averaging about 5 days. And, traffic which would receive 4-day service under applicant's proposals is shown to have received between 3- and 15-day service, with an average transit time of about 6 days. Many of the service exhibits do not cover all of the shipper's pertinent traffic during the study period and some include shipments which were listed because complaints were received on this traffic. Nonetheless, in our opinion, the exhibits, taken collectively are representative of the service these shippers are and have been receiving."

At 114 M.C.C. 599, the Commission stated:

> "The studies relate to periods of from 1 day to 1 year, with most covering 1-week periods. They usually embrace all of a carrier's relevant traffic handled during the

period or that traffic handled for specified shippers during a specified period. The 1-year study of all the relevant traffic handled by one carrier demonstrates on-time performances ranging from a low of 2.0 percent (from Fort Smith, Ark., to South Plainfield, N.J.) and 2.2 percent (from Fort Smith to Newark, N.J.) to a high of 73.3 percent (From Kansas City, Mo. to Washington, D.C.), with the average on-time performance of all the traffic listed being 33.5 percent. Generally, the exhibits cover periods subsequent to the notice of the commencement of the hearings in these proceedings. As a consequence, while they demonstrate that in certain instances during the study periods expeditious service was rendered by certain of the protestants, these studies must be considered in the light of the facts (1) that most either relate to short periods of time or cover traffic handled for specified shippers and (2) that they were made when protestants were confronted with the possibility of grants of authority to additional carriers. When viewed in this light, we believe that protestants' studies do not present as valid a picture as those introduced by those witnesses supporting the applications here under consideration."

At 114 M.C.C. 600, the Commission stated:

"Studies introduced by many of the supporting witnesses show that the motor movement of much of their pertinent traffic has transit times of at least 1 day more than applicants proposals. Admittedly, some of these exhibits cover only a limited number of those shipments transported between relevant points during the study period. It also appears that some of the witnesses either have not tried all of the available motor carrier service or did not route their relevant traffic. These infirmities, however, do not substantially affect the weight which should be accorded to the documentary evidence collectively presented by the supporting witnesses. Considered as a whole,

(10) MC-F-9921, Bowman-Purchase (Portion) Alabama Highway Express (August 1968) (ERO appendix A, p. 25) (O, p. 585)

(11) MC-94201, Sub 86, Bowman Trans., Inc. (July 1971) (O, p. 575 and 772)

(12) 104 M.C.C. 737-Yellow Freight-Merger-Watson-Wilson (December 1968) (ERO appendix D, p. 12) (O, p. 764)

(13) MC-F-9918, Mercury Freight Lines, Inc.-Purchase (Portion)-Sam N. Cole (April 1969) (ERO, appendix D, p. 27) (O, p. 771)

(14) West Brothers-Extension-Natchez and Baton Rouge (ERO appendix D, p. 29) (O, p. 772)

(15) MC-F-9871, Admiral-Merchants-Control-Jack Cole-Dixie Highway Co. (November 1967) (ERO appendix D, p. 36) (O, p. 777)

(16) MC-F-10107, Jack Cole-Merger-Dixie Highway (October 1968) (O, p. 634)

(17) 109 M.C.C. 76, Consolidated Freight-Control (1969) and MC-42487, Sub 744 (January 1971) (O, p. 759)

(18) MC-F-9822 and MC-35320 (Sub 109), T.I.M.E.-DC (May 1970) (O, p. 762)

(19) 110 M.C.C. 892 (1969), Georgia-Florida-Alabama Transp. Co. Extension (O, p. 774)

(20) MC-41432 (Sub 103), East Texas Motor Freight, Inc. Ext.-Mississippi and Louisiana Points (1971) (O, p. 779)

(21) MC-F-10260 and MC-31389 (Sub 120), McLean Trucking Co.-Purchase-S. Z. Harrison (August 1970) (O, p. 784)

(22) MC-31389 (Sub 121), McLean as substituted applicant for Herrin (March 1970) (O, p. 784)

(23) 112 M.C.C. 558 (1970) Braswell Motor Freight Lines, Inc., Ext., MC-111383 (Sub-No. 17) (July 1971) (O, p. 792)